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The African Charter on Democracy, Elections and Governance: Past, Present and Future

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Abstract

This article traces a genealogy of the African Charter on Democracy, Elections and Governance (ACDEG) and examines the charter's overall implementation. While there has always been a struggle between competing views of how to ensure more or less continental accountability for norms related to democratic governance in Africa, enforcement by the African Union (AU) has definitively become more robust since the ACDEG's adoption. The article argues that this development is observable in three trends: continental legalization, technocratization and judicialization of politics. It evaluates the growth of normative commitments in the field of democracy, elections and governance and their increasing consolidation into binding legal treaties; explores the increasing reliance on AU technical assistance in the implementation and interpretation of these instruments; and assesses the expanding role of continental and regional judicial bodies in enforcing commitments to democracy. Building upon a better understanding of these trends, the article identifies key contextual factors that will shape the ACDEG's future implementation.

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INTRODUCTION

Contrary to customarily bleak accounts, Africa has undergone significant changes that have resulted in improvements in its governance landscape over the past decade.¹ Yet, the continent is also still marked by civil wars (for example in South Sudan and Libya), coups d'état (for example in Egypt and Zimbabwe), serious human rights violations (for example in Sudan and Eritrea) and election related violence (for example in Kenya and Democratic Republic of the Congo). The African Charter on Democracy, Elections and Governance (ACDEG) is a unique instrument, aimed at addressing these challenges so as to, in the words of its preamble, “deepen and consolidate the rule of law, peace, security and development”.

Having initially envisaged a declaration,² the African Union (AU) Commission persuaded the Executive Council to authorize the development of a legally binding treaty based on the collective commitments already made by AU member states in the domains of elections, democracy and governance.³ The AU Commission's arguments were based on a consolidation logic and a declaration fatigue. Invoking the advantage of bringing all these commitments together in one text,⁴ as well as considering “that the Organization had already adopted many Declarations and Decisions on the same issue”, the AU Commission recommended “a more binding text in the form of a Charter rather than yet another declaration”.⁵

Since its adoption in 2007 and subsequent entry into force in 2012, the ACDEG has generated considerable interest from scholars and practitioners.⁶

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- 1 “African governance remains on a moderate upward trajectory”: 2018 Ibrahim Index of African Governance Report (2018, Mo Ibrahim Foundation) at 17.
 - 2 Draft AU Declaration on Elections, Democracy and Governance (20 February 2003) (copy on file with the authors).
 - 3 Decision of the Meeting of Experts on Elections, Democracy and Governance in Africa (2004), EX.CL/Dec. 124(V).
 - 4 Report of the Interim Chairperson on the Proceedings of the African Conference on Elections, Democracy and Good Governance (2003), EX.CL/35(III) at 12 (copy on file with the authors).
 - 5 Report on the Meeting of Government Experts on the Documents from the Pretoria Conference on Elections, Democracy and Governance (2004), EX.CL/91(V), annex IV at 1 (copy on file with the authors).
 - 6 See, for example, ER McMahon *The African Charter on Democracy, Elections and Governance: A Positive Step on a Long Path* (2007, Open Society Institute); K Matlosa “The African Charter on Democracy, Elections and Governance: Declaration vs policy practice” (2008) 53 *Centre for Policy Studies Policy Brief* 1; PJ Glen “Institutionalizing democracy in Africa: A comment on the African Charter for Democracy, Elections and Governance” (2012) 5 *African Journal of Legal Studies* 119.

Although scholars largely agreed on the ACDEG's potential, many were sceptical about its implementation and anticipated effects.⁷ Academic literature in the fields of both law and political science has increasingly paid attention to the ACDEG's role in dealing with "unconstitutional changes of governments"⁸ and in particular military coups d'état.⁹ There is also a growing scholarly interest in the role of the AU in addressing serious democratic governance challenges related to popular uprisings¹⁰ and the manipulation of presidential term limits.¹¹ Yet, there is a dearth of literature that considers the implementation of the ACDEG in a broader, holistic sense.

This article does so by examining the implementation of the ACDEG in light of its contested background, the broader continental governance trends of which it is part and the factors that may undermine or contribute to its future success. The first section sets out a historical account that traces the genealogy of different sets of ideas within the AU, which broadly fall within the ACDEG's mandate of supporting and defending democracy, elections and good governance. This part of the article focuses on the main rationales, struggles and core tensions underpinning the different continental agendas in the field of democratic governance, with the aim of identifying the assumptions and worldview on which the ACDEG is based. The next section examines the ACDEG's impact over the past decade since its adoption, including the various legal and institutional initiatives to which it has given rise and its operationalization in different policy domains. Here, the article considers how three concurrent

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- 7 See, for example, I Kane "The implementation of the African Charter on Democracy, Elections and Governance" (2008) 17/4 *African Security Review* 43; ST Ebobrah *The African Charter on Democracy, Elections and Governance: A New Dawn for the Enthronement of Legitimate Governance in Africa?* (2007, Open Society Institute); S Saungweme *A Critical Look at the Charter on Democracy, Elections and Governance in Africa* (2007, Open Society Institute); SA Elvy "Towards a new democratic Africa: The African Charter on Democracy, Elections and Governance" (2013) 27/1 *Emory International Law Review* 41.
 - 8 See, for example, TK Tiekou "Multilateralization of democracy promotion and defense in Africa" (2009) 56/2 *Africa Today* 75; M Ndulo "The prohibition of unconstitutional change of government" in AA Yusuf and F Ouguergouz (eds) *The African Union: Legal and Institutional Framework: A Manual on the Pan-African Organization* (2012, Martinus Nijhoff) 251; S Vandeginste "The African Union, constitutionalism and power sharing" (2013) 57/1 *Journal of African Law* 1; M Wiebusch *The Role of Regional Organizations in the Protection of Constitutionalism* (2016, International Institute for Democracy and Electoral Assistance).
 - 9 Y Omorogbe "A club of incumbents? The African Union and coups d'état" (2011) 44/123 *Vanderbilt Journal of Transnational Law* 123; I Souaré "The African Union as a norm entrepreneur on military coups d'état in Africa (1952–2012): An empirical assessment" (2014) 52/1 *Journal of Modern African Studies* 69.
 - 10 See SA Dersso "The status and legitimacy of popular uprisings in the AU norms on democracy and constitutional governance" and P Manirakiza "Towards a right to resist gross undemocratic practices in Africa", both in this issue.
 - 11 See M Wiebusch and C Murray "Presidential term limits and the African Union" in this issue.

trends of continental governance (legalization, technocratization and judicialization of continental politics) have been evident in, and influenced the implementation of, the charter. The final section considers the ACDEG's prospects based on a contextualized analysis. It highlights the challenges and opportunities that are likely to have a bearing on the instrument's future interpretation and implementation.

Through this three step analysis, a story emerges that situates the ACDEG at the very heart of developments in African governance. Its transformation from a project to consolidate existing political commitments on democratic governance into a legally binding treaty has been followed by its implementation, which has been frequently characterized by multiple practices and tensions at the interface of law and politics. Developed with the aim of addressing political (mal)practice through law, the ACDEG now forms a crucial yardstick for holding states legally accountable for (dis)respecting norms on democracy and good governance.

THE PAST: CONTESTATION AND CONSOLIDATION

The ACDEG was adopted at the eighth ordinary session of the AU Assembly of Heads of State and Government (the Assembly), held in Addis Ababa in 2007, and is open only for signature, ratification and accession by AU member states. As has become fairly standard practice for AU treaties, the ACDEG requires 15 signatures to enter into force. The 15th signature was deposited in February 2012. Since then, 17 more states have ratified the ACDEG. As of January 2019, it had been ratified by a total of 32 states and signed by 46 states. Although the ACDEG has only been ratified by barely more than half of the AU member states, it is still one of the most widely ratified and signed AU treaties.¹²

As an exclusive AU instrument, the ACDEG forms part of broader policy approaches and responses by the AU and its predecessor, the Organisation of African Unity (OAU), in addressing issues of continental human rights protection, democratization, collective security, international development and good governance programmes. It consists of 11 chapters, of which three are operational (chapters 1, 10 and 11: definitions; mechanisms for application; and final clauses) and eight are substantive (chapters 2–9: objectives; principles; democracy, rule of law and human rights; the culture of democracy and peace; democratic institutions; democratic elections; sanctions in cases of unconstitutional changes of government; and political, economic and social governance). Throughout, the ACDEG establishes minimum continental

12 A list of the signature, ratification, accession and deposit status of all (O)AU treaties, conventions, protocols and charters is available at: <<https://au.int/en/treaties>> (last accessed 9 January 2019).

standards for ensuring, promoting and protecting democracy, the rule of law, human rights, peace and socio-economic development.¹³

The main question underlying this specific legal and political project strikes at the heart of the relationship between the continental organization and its member states: should there be more or less continental influence and oversight of the way the domestic political and socio-economic order is organized? In other words, should domestic governance arrangements be further “Africanized”? The authors understand *Africanization* as a collective effort to imagine and organize a political project based on a continentally defined identity. Specifically, it is the process through which the AU’s political arrangements increasingly structure and become part of domestic policy making. Conflicting perspectives on this issue are part and parcel of the organization’s history, nature and purpose. They lay at the heart of the establishment of the organization in the early 1960s,¹⁴ and remained present throughout its institutional development into the AU¹⁵ and the various attempts to reconfigure the workings of the AU.¹⁶ The ACDEG can be described as yet another manifestation of the struggle between continuously evolving views of how to ensure more or less continental accountability for certain commitments to a particular socio-political order, namely, in this particular case, a liberal democratic order.¹⁷

Against this background, the ACDEG is the outcome of an encounter of various continental governmental agendas woven throughout the history of the (O)AU. In each of these agendas, different struggles took place, based on competing interests over the extent of continental norm setting and continental accountability mechanisms. Norm setting refers to the scope of the commitments made by member states aimed at improving governance in Africa, while accountability mechanisms refer to the degree to which the AU may enforce these commitments.

The following overview does not attempt to provide a complete history of the various components that constitute the ACDEG. Instead it focuses on those fields that have proven to be most influential in respect of how the charter is operationalized today. Specifically, it considers those elements where the

13 See also ACDEG, art 52, which provides: “None of the provisions of the present Charter shall affect more favourable provisions [contained] in national legislation [or other applicable] regional, continental or international conventions.”

14 K van Walraven *Dreams of Power: The Role of the Organization of African Unity in the Politics of Africa, 1963–1993* (1999, Ashgate).

15 TK Tieku “Explaining the clash and accommodation of interests of major actors in the creation of the African Union” (2004) 103 *African Affairs* 249; M Welz *Integrating Africa: Decolonization’s Legacies, Sovereignty and the African Union* (2012, Routledge).

16 D Lecoutre “Vers un gouvernement de l’Union Africaine? Maximalistes vs gradualistes” [Towards an African Union government? Maximalistes v gradualistes] (2007) 147 *Institute for Security Studies Paper* 1; A Witt “The African Union and contested political order(s)” in U Engel and J Gomes Porto (eds) *Africa’s New Peace and Security Architecture: Continental Embeddedness, Transnational Linkages, Strategic Relevance* (2013, Ashgate) 11.

17 Elvy “Towards a new democratic Africa”, above at note 7.

tension between competing visions of the degree of continental governance was most visible. What it particularly aims to emphasize is that many ideas and policy proposals on more robust norm setting and norm enforcement in the domain of democratic governance already existed at the continental level, but that they had been rejected in favour of a more cautious approach. The article highlights that, despite earlier contestation, the continental regime is returning to previously silenced ideas and is progressively moving towards more comprehensive norms in the domain of democratic governance, and stronger mechanisms to ensure their implementation and enforcement. This trend can be observed in three specific policy domains: human rights, elections and unconstitutional changes of government.

The OAU Charter of 1963, establishing the OAU, was markedly void of any explicit references to political governance imperatives such as democracy, elections, rule of law and human rights. The OAU Charter did recognize in its preamble that “freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples”. Yet, these principles were not explicitly made part of the OAU’s core mandate. Instead, the emphasis on human rights was mostly peripheral to the organization’s main agenda on decolonization, territorial integrity and economic growth: overall, an agenda that focused more on states than individuals.¹⁸ It was only towards the late 1970s that this preambular provision of the OAU Charter was used as a normative basis to develop the African Charter on Human and Peoples’ Rights (African Charter).¹⁹

The African Charter recognizes a number of rights that later found their way into the ACDEG. The right to participate in government²⁰ is undoubtedly of greatest relevance to the core ideas behind the ACDEG. The ACDEG to a large extent can be described as an overall elaboration of this right by setting more detailed conditions for its fulfilment. Other important rights that found their way into the ACDEG include the rights to freedom from discrimination,²¹ equality before the law and equal protection of the law,²² freedom of expression,²³ education,²⁴ a satisfactory environment,²⁵ and peace and security.²⁶ While ideas were already circulating among non-governmental organizations (NGOs), lawyers, judges and scholars from various African countries to

18 A Huneeus and M Madsen “Between universalism and regional law and politics: A comparative history of the American, European, and African human rights systems” (2018) 16/1 *International Journal of Constitutional Law* 136 at 149.

19 African Charter (1981), preamble.

20 Id, art 13.

21 African Charter, art 2. ACDEG, art 8.

22 African Charter, art 3. ACDEG, art 10(3).

23 African Charter, art 9. ACDEG, art 27(8).

24 African Charter, art 17. ACDEG, art 43.

25 African Charter, art 24. ACDEG, art 42.

26 African Charter, art 23. ACDEG, art 38.

establish a judicial body to enforce human rights in the early 1960s,²⁷ they were rejected by the lead drafters during the preparation of the African Charter in the late 1970s and early 1980s. A continental mechanism to ensure accountability of member states' human rights commitments was found "premature",²⁸ and instead a quasi-judicial institution, the African Commission on Human and Peoples' Rights (ACHPR), was established to promote and protect human rights without the ability to make legally binding decisions.²⁹ It would take two more decades before the African Court on Human and Peoples' Rights (ACtHPR) was established.³⁰ However, the African Charter did establish an important procedure that eventually shaped the accountability mechanisms embedded in the ACDEG. This is the state reporting mechanism coordinated by the ACHPR, which imposes an obligation on states to submit bi-annually an account of the various legislative and other measures taken to give effect to the provisions of the African Charter.³¹ While continental monitoring in the form of state reporting mechanisms had first been established in 1968 with the African Convention on the Conservation of Nature and Natural Resources,³² it was the reporting under the African Charter that set the overall template for state reporting mechanisms in the (O)AU context.³³

How did the OAU then transform from an organization widely viewed as a champion of sovereignty and non-interference, often to the detriment of

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- 27 See International Commission of Jurists "Law of Lagos" (1961) 3/1 *Journal of International Commission of Jurists* 9, para 4.
 - 28 F Viljoen "The African Charter on Human and Peoples' Rights: The travaux préparatoires in the light of subsequent practice" (2004) 24/9–12 *Human Rights Law Journal* 313 at 316.
 - 29 For an account that argues that the ACHPR findings can be seen as legally binding, see F Viljoen and L Louw "The status of the findings of the African Commission: From moral persuasion to legal obligation" (2004) 48/1 *Journal of African Law* 1.
 - 30 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court (1998). See, for example, NJ Udombana "Toward the African Court on Human and Peoples' Rights: Better late than never" (2000) 3/1 *Yale Human Rights and Development Law Journal* 45.
 - 31 African Charter, art 62. ACDEG, art 49.
 - 32 African Convention on the Conservation of Nature and Natural Resources (1968, entered into force in 1969), art 16. This convention was revised in 2003, but has not yet entered into force. See art 29 for the reporting procedure.
 - 33 Later state reporting mechanisms were included in other human rights instruments and states are required to report to the ACHPR on those respective instruments as part of the Banjul Charter reporting procedure. These instruments include the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Convention for the Protection and Assistance of Internally Displaced Persons in Africa and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa. Other legal instruments established a separate entity to which state parties have to report: the African Committee of Experts on the Rights and Welfare of the Child in respect of the African Charter on the Rights and Welfare of the Child; the African Commission on Nuclear Energy in respect of the African Nuclear Weapon-Free Zone Treaty; and the AU Advisory Board on Corruption in respect of the Convention on Preventing and Combating Corruption.

African citizens suffering from serious security, political and economic hardships, to an organization that champions principles and ideas such as democracy, the rule of law and human rights? For this transformation to take place a change of worldview was needed. The first comprehensive statement of such a changing worldview is found in the 1990 OAU Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World (Declaration on Fundamental Changes).³⁴ A number of important geo-political contextual changes prompted the adoption of this declaration, including: the end of the Cold War; political changes in Central and Eastern Europe possibly leading to greater “price competition between Eastern Europe and Africa for access to Western markets”³⁵ and economic, technical and cultural assistance being diverted away from Africa to Eastern Europe; political conditionality from donors, making the existence of multi-party democracy a condition for aid; and a “global tendency towards regional integration and the establishment of trading and economic blocks”,³⁶ resulting in a “new international economic order that could further debilitate and marginalize Africa”.³⁷

The Declaration on Fundamental Changes and the ideas contained in it triggered a diverse set of initiatives that in one way or another ended up being codified in the ACDEG. First, it formalized a continental commitment to a liberal agenda broadly associated with democracy, the rule of law and human rights.³⁸ This ideological commitment was reproduced in the founding treaty of the AU as part of its core principles³⁹ and later formed the normative basis of the ACDEG.⁴⁰ Secondly, it formally endorsed the OAU’s involvement in the

34 Declaration of the OAU Assembly of Heads of State and Government on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, AHG/Decl.1 (XXVI) (1990).

35 *Report of the Secretary General on the Fundamental Changes Taking Place in the World and their Implications for Africa: Proposals for an African Response* (CM/1592) (1990), para 39 (copy on file with the authors).

36 Declaration on Fundamental Changes, above at note 34, para 2.

37 *Report of the Secretary General on the Fundamental Changes*, above at note 35, para 58.

38 Declaration on Fundamental Changes, above at note 34, para 2: “We are fully aware that in order to facilitate this process of socio-economic transformation and integration, it is necessary to promote popular participation of our peoples in the processes of government and development. A permitting political environment which guarantees human rights and the observance of the rule of law, would ensure high standards of probity and accountability, particularly on the part of those who hold public office. In addition, popular-based political processes would ensure the involvement of all including in particular women and youth in the development efforts. We accordingly recommit ourselves to the further democratization of our societies and to the consolidation of democratic institutions in our countries.”

39 Constitutive Act of the AU (2000), preamble and art 4(m): “respect for democratic principles, human rights, the rule of law and good governance”.

40 ACDEG, preamble.

process of democratization and consolidating democratic institutions.⁴¹ This involvement was directed primarily towards electoral processes through election observation. The OAU started its election observation practice in 1989 with a joint UN mission to observe the elections in Namibia. Its first independent mission took place in February 1990 when an OAU team consisting of three members was invited to observe the presidential election in Comoros.⁴² For the next ten years, the OAU organized several other missions at the invitation of member states. But it did so without an explicit mandate. Although there was an emerging “consensus among Member States in favour of the OAU assuming a major role in the monitoring of elections, to date no formal decision or resolutions has specified in clear and concise terms the goal and objectives of such activities”.⁴³ Therefore, the OAU commenced a process to develop a legal mandate to observe elections, which ultimately led to the 2002 (O)AU Declaration on the Principles Governing Democratic Elections in Africa. Again the tension between more and less continental accountability became apparent. Some states argued for an AU mandate to observe “all elections in Member States without invitation, but as [sic] mandatory responsibility”.⁴⁴ Several other states opposed this idea, considering that “issues of sovereignty and non-interference in internal matters might conflict with such a proposal”,⁴⁵ and insisted on prior invitation by states. This position towards less robust continental accountability was also reflected in the ACDEG, since the AU still needed an invitation to send an electoral observer mission. At the same time however, the new wording in the ACDEG already reflected a more progressive stance, since states now have a quasi-obligation to send an invitation.⁴⁶ Subsequent practice shows that the AU now also sends missions when it has not received a formal invitation.⁴⁷ One of the key triggers of this change in approach was the absence of an invitation for the AU to observe the Kenyan elections in 2007, which were marred by serious post-electoral violence.⁴⁸

The greater continental concern with the political system of AU member states was complemented by an emerging consensus on the need to address the challenge of coups d'état. While the 1990 Declaration on Fundamental

41 *Report of the Secretary General on Strengthening the Role of the OAU / AU in Elections, Observations and Monitoring and the Advancement of the Democratization Process in Africa*, CM/2257 (LXXVI) (2002) at 1 (copy on file with the authors).

42 *Ibid.*

43 *Id* at 8.

44 *Report on the Meeting of Government Experts*, above at note 5, annex A at 6.

45 *Ibid.*

46 ACDEG, art 19 stipulates: “Each State Party shall inform the Commission of scheduled elections and invite it to send an electoral observer mission.” (emphasis added)

47 S Karume and E Mura “Reflections on African Union electoral assistance and observation” in R Cordenillo and A Ellis (eds) *The Integrity of Elections: The Role of Regional Organizations* (2012, International Institute for Democracy and Electoral Assistance) 21 at 30.

48 *Ibid.*

Changes paved the way for the OAU's democratization agenda, it also provided the impetus to strengthen the continent's peace agenda. This was most obvious with the adoption of the 1993 Declaration of the Assembly of Heads of State and Government on the Establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution (Cairo Declaration). This mechanism was built around the Central Organ, the forerunner of the AU Peace and Security Council (PSC), to "assume overall direction and co-ordinate the activities of the Mechanism".⁴⁹ Following the coup d'état by mercenaries in Comoros in 1995, the Central Organ resolved to establish a sub-committee to develop a continental response to unconstitutional changes of government.⁵⁰ This agenda later formed a centre piece of the ACDEG.⁵¹ However, the unconstitutional changes of government agenda can trace its origins much further back. In fact, one of the key principles underlying the OAU's purpose, as established in the 1963 OAU Charter, is the "[u]nreserved condemnation, in all its forms, of political assassination as well as of subversive activities on the part of neighbouring States or any other States".⁵² These concerns, prompted among other things, by the assassinations of Congolese and Togolese independence leaders Patrice Lumumba (1961) and Sylvanus Olympio (1963) respectively,⁵³ were further addressed in the OAU Convention for the Elimination of Mercenarism in Africa (1977) (Mercenarism Convention). The core objective of this instrument was to address the grave threats to self-determination and development caused by the activities of mercenaries,⁵⁴ witnessed for instance in their use by the colonial power Portugal against Guinea with the aim of "intimidating those States which in the name of African solidarity ... are giving material and moral support to the liberation movements".⁵⁵ The issue returned to the OAU's agenda in dealing with mercenary activities orchestrated by racist regimes in Southern Africa (1979),⁵⁶ as well as in condemning foreign mercenary involvement in the failed coup in the Seychelles (1982)⁵⁷ and later in Equatorial Guinea (2004).⁵⁸ The Mercenarism Convention eventually formed part of the normative foundation for the (O)AU's anti-unconstitutional change of government agenda, which expressly bans "any intervention by mercenaries to

49 Cairo Declaration, paras 17–18.

50 *Report of the OAU Central Organ Sub-Committee on the Preparation of a Blue Print for Dealing with Unconstitutional Changes of Government in Africa* (sub-cttee/central organ/rpt (III)) (1995) (copy on file with the authors).

51 See above at note 8.

52 OAU Charter, art III(5).

53 See van Walraven *Dreams of Power*, above at note 14 at 112 and 133.

54 Mercenarism Convention, preamble read in conjunction with art 1(2).

55 ECM/Res. 17 (1970) (copy on file with the authors).

56 Resolution on the Activities of Mercenaries in Zimbabwe and Namibia and against the Front-Line States, CM/Res 695(XXXII) (1979) (copy on file with the authors).

57 Resolution on the Mercenary Aggression against the Republic of Seychelles, CM/Res.906 (XXXVIII) (1982).

58 Declaration on Equatorial Guinea, Assembly/AU/Dec.37(III) Rev.1 (2004).

replace a democratically elected government”.⁵⁹ The convention also represented the first serious attempt by the continental organization to criminalize subversive acts internationally, an approach to which it returned decades later when adopting the 2014 Malabo Protocol⁶⁰ to establish an international criminal jurisdiction for the AU’s judicial mechanism, including for mercenarism.

In the 1990s, over a series of meetings that coincided with a number of coups (Sierra Leone 1997, Guinea Bissau 1998, Niger 1999, Comoros 1999 and Côte d’Ivoire 1999), the OAU Central Organ Sub-Committee developed a framework to address unconstitutional changes of government, drawing on the OAU Charter, the African Charter, the Declaration on Fundamental Changes, the Cairo Declaration and the Mercenarism Convention.⁶¹ It set out several common values and principles for democratic governance and a list of eight scenarios that should be understood as an unconstitutional change of government that may trigger a continental response.⁶² Four definitions of the notion of unconstitutional changes of government were maintained in the resulting 2000 Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (Lomé Declaration). These definitions focus on military, mercenary and rebel coups as well as refusals to accept electoral outcomes.⁶³ Yet, four other definitions were rejected: the refusal by a government to organize elections at the end of its term of office in violation of the constitution; any manipulation of the constitution aimed at preventing a democratic change of government; any form of election rigging and electoral malpractice, duly confirmed by the OAU or ascertained by an independent and credible body established for that purpose; and systematic and persistent violation of the common values and democratic principles referred to above.⁶⁴

While these scenarios were excluded from the Lomé Declaration, these forms of unacceptable behaviour gradually made their way back onto the AU agenda. Manipulation of constitutions re-entered the debate during the preparation of the ACDEG. Although the initial focus was on attempts “to prolong the tenure of office for the incumbent government”,⁶⁵ this specific

59 ACDEG, art 23(2).

60 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014) (Malabo Protocol), art 28H.

61 See *Report of the OAU Central Organ Sub-Committee on the Preparation of a Blue Print for Dealing With Unconstitutional Changes of Government in Africa*, SUB-CTTEE/CENTRAL ORGAN/RPT (III) (1995) (copy on file with the authors).

62 *Report of the Secretary General on the Implementation of the Algiers Decisions of the Assembly of Heads of State and Government and the Council of Ministers on Unconstitutional Changes of Government*, CM/2166(LXXII)Rev.2 (2000), annex D (copy on file with the authors).

63 These definitions were later reproduced in the ACDEG; see art 23(1)–(4).

64 *Report of the Secretary General on the Implementation of the Algiers Decisions of the Assembly of Heads of State and Government and the Council of Ministers on Unconstitutional Changes of Government*, CM/2166(LXXII)Rev.2 (2000), annex D (copy on file with the authors).

65 *Report of the Ministerial Meeting on the Draft African Charter on Democracy, Elections and Governance and on the Revision of the Lomé Declaration on Unconstitutional Changes of Government in Africa*, EX.CL/258(IX) (2006), paras 40–44 (copy on file with the authors).

provision was later changed to address the arguably broader, but more vague, “infringement on the principles of democratic change of government”.⁶⁶ One characteristic of these excluded types of unconstitutional changes of government is that they are less concerned with transfers of constitutional power and external threats to the constitutional regime. Instead, they target the undemocratic exercise of power by incumbent regimes. Although the idea of sanctioning this sort of behaviour was previously rejected, momentum has kept growing for the AU to pay more attention to this problem. The challenges posed by popular uprisings and presidential term limits, in particular, and the question of how to deal with them, have increasingly led to calls for the AU to address systematic violations of democratic norms by incumbent regimes.⁶⁷ To some extent, the AU has already acted on these norms by condoning popular uprisings during the Arab Spring⁶⁸ and condemning (albeit inconsistently) manipulations of constitutions and electoral fraud.⁶⁹

The historical genesis of a number of policy agendas and instruments in the (O)AU setting shows the gradual emergence, acceptance and consolidation of core notions of democratic governance at the continental level. These notions include a commitment to democracy, human rights and the principle of the rule of law,⁷⁰ peace, security and stability,⁷¹ constitutional rule (particularly constitutional transfer of power),⁷² as well as sustainable development.⁷³ Yet, simply focusing on the development of these notions, or even presenting them as linear, steady progress towards a continental democratic government model, would mask a series of tensions underlying these key continental agendas. As shown above, the progress in developing the AU’s agenda on democratic governance was not so much one of constant innovation. Instead, it mostly concerned reviving older, rejected ideas about continental norm setting and enforcement.

THE PRESENT: LEGALIZATION, TECHNOCRATIZATION AND JUDICIALIZATION

Building on the observation about the increasingly more prominent role of the AU in setting and enforcing continental governance standards, this section

66 ACDEG, art 23(5). See Wiebusch and Murray “Presidential term limits”, above at note 11.

67 See “Unconstitutional changes of governments and popular uprisings in Africa: Challenges and lessons learnt”, (PSC press statement, PSC/PR/BR (CDXXXII), 2014) and “Peace, security, prosperity and embracing the value of democracy and governance: Is the African Charter on Democracy, Elections and Governance adequate?” (PSC press statement PSC/PR/BR (DCCXCI), 2018). See also Dersso “The status and legitimacy of popular uprisings”, above at note 10; Manirakiza “Towards a right to resist”, above at note 10; and Wiebusch and Murray “Presidential term limits”, above at note 11.

68 See Dersso and Manirakiza, *ibid*.

69 See Wiebusch and Murray “Presidential term limits”, above at note 11.

70 ACDEG, art 4.

71 *Id*, art 38.

72 *Id*, art 5.

73 *Id*, art 9.

considers the implementation of the ACDEG. Specifically, it examines the implementation of the ACDEG in the context of three trends: the continental legalization, technocratization and judicialization of politics.⁷⁴ First, it focuses on the growth of normative commitments in the field of democracy, elections and governance and their increasing consolidation into binding legal treaties (turn to law). Secondly, it explores the implementation and interpretation of these normative instruments, with a particular focus on the different initiatives to ensure and monitor compliance with these instruments, initiatives that are increasingly reliant on technical experts without an explicit political or diplomatic mandate (turn to experts). Thirdly, it assesses the expanding role of continental and regional judicial bodies in enforcing commitments to democratic governance (turn to courts). In examining these trends, the article explains how the ACDEG is both a result of these processes as well as a catalyst accelerating them.

Legalization

The ACDEG's status as a treaty represents a significant milestone in the normative development of the African continental governance system. Unlike various policy declarations on democracy and governance that preceded it, such as the Lomé Declaration (2000) and the (O)AU Declaration on the Principles Governing Democratic Elections in Africa (2002), the ACDEG was designed as a binding legal instrument. Locking in the various continental commitments and making the ACDEG part of the AU's treaty regime has a number of advantages and disadvantages, and at the same time reflects certain beliefs about the role of law in addressing societal problems.

Since 1963 the (O)AU has developed more than 60 multilateral treaties.⁷⁵ Their subject matter covers a range of issues, including economic integration (such as free trade), social affairs (such as culture and sport), human rights (such as women, children and internally displaced persons), security (such as road safety and cyber security) and institutional frameworks (such as the PSC and Pan-African Parliament). The form of these AU treaties differs, from establishing a unique treaty (for example the Mercenarism Convention),

74 While the focus here lies at the continental level, similar trends have been discussed in a more general "international" sense. See, for example, J Goldstein, M Kahler, RO Keohane and AM Slaughter "Introduction: Legalization and world politics" (2000) 54/3 *International Organization* 385; D Kennedy *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (2016, Princeton University Press); and K Alter *The New Terrain of International Law: Courts, Politics, Rights* (2014, Princeton University Press). The framework of legalization, technocratization and judicialization is inspired by the concept of "regional constitutionalism", developed by Cebulak and Wiebusch, which draws on a similar structure to explore and interrogate possible tensions and channels of interaction between regional organizations and constitutional law; see P Cebulak and M Wiebusch "Comparative regional constitutionalism: Towards a research agenda" (paper presented at the International Society of Public Law (ICON-S) Conference on Borders, Otherness and Public Law, Berlin, 17–19 June 2016).

75 An overview of different AU treaties is available at: <<https://au.int/en/treaties>> (last accessed 10 January 2019).

complementing an existing treaty by the adoption of protocols (for example the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa), to revising existing treaties (such as the 2006 Charter for African Cultural Renaissance replacing the 1975 Cultural Charter for Africa). Remarkably there has been an exponential growth of the continental treaty regime since the establishment of the AU. Over the course of almost four decades (1963–99), the OAU adopted 20 treaties (less than 40 per cent of the total number of treaties). In contrast the AU has adopted more than 40 treaties (more than 60 per cent of the total number) in less than two decades (2000–18). This trend reflects a greater institutionalization of continental governance mechanisms through law. It also suggests a level of confidence within the AU system in the ability of law to engineer social change.

The ACDEG is not only an important instrument in the body of AU treaty law. It has also contributed to the AU's law-making process. Since its adoption, the ACDEG has given rise directly and indirectly to three more AU treaties. First, the African Charter on Values and Principles of Public Service and Administration was adopted in 2011. This instrument builds on the ACDEG by giving more detail to its objectives related to improved public sector management, with a particular focus on transparency, access, and more efficient and effective public service delivery.⁷⁶ Secondly, in line with the commitment established in article 34 of the ACDEG, which calls upon state parties to "decentralize power to democratically elected local authorities as provided in national laws", the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development was adopted in 2014. This treaty outlines various principles, values and mechanisms to bolster the role of local governments and local authorities as cornerstones of democratic governance systems and economic development.⁷⁷ Both these instruments have a remarkable structural and procedural resemblance to the ACDEG, especially with regard to their envisaged implementation. Each of them outlines similar roles at the national, regional and continental levels for giving effect to the commitments contained in the respective charter, together with respective state reporting mechanisms coordinated by the AU Commission. Thirdly, one of the key innovations established in the ACDEG is the possibility of trying perpetrators of unconstitutional changes of government or coups d'état through a continental judicial mechanism.⁷⁸ This mechanism was further elaborated in the Malabo Protocol, which grants criminal jurisdiction to a yet to be established merged African Court of Justice and Human Rights with specific jurisdiction over the "crime of unconstitutional change of government".⁷⁹ The

76 See ACDEG, arts 2(10), 3(7)–(9), 27(4)–(5), 32(1) and 33(1)–(3).

77 See African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development, preamble and arts 2 and 7.

78 ACDEG, art 25(5).

79 The Malabo Protocol (above at note 60) also establishes the jurisdiction of an African court for piracy, corruption and terrorism, among other international crimes. As of

definition of the crime also extends the typology of unconstitutional changes of government by adding as a sixth possible qualification: “any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors”.⁸⁰

This move towards more (treaty) law has a series of apparent advantages. The adoption of treaties and their subsequent ratification, which establishes at the international plane a state's consent to be bound by a treaty,⁸¹ signal a more credible commitment by states and the AU (as a forum and through its institutions) to the principles and objectives set out in a treaty.⁸² A treaty also unlocks a number of possible enforcement mechanisms generally not available with other sources of non-binding or soft law. This may include monitoring mechanisms in the form of state reporting or coercive enforcement by the PSC or (quasi)judicial bodies such as the ACHPR and the ACtHPR.⁸³ Furthermore, a whole set of techniques can be deployed to appeal for signature, ratification and implementation, routinely pronounced by AU policy organs and governance monitoring mechanisms (including the Assembly, Executive Council, PSC, African Peer Review Mechanism (APRM) and AU Election Observation Missions (AUEOMs)). The AU also developed a range of specific practices, including: an AU treaty signing week to encourage member states to commit to treaties they have not yet signed; AU advocacy and ratification campaigns to maximize treaty ratification; and technical assistance projects to help states overcome obstacles related to ratification.⁸⁴ Treaties also facilitate mobilization by civil society actors to raise awareness and advocate for compliance.⁸⁵

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January 2019, 11 countries had signed the protocol, but none had yet ratified it. The protocol only enters into force after the deposit of instruments of ratification by 15 member states.

80 Id, art 28E. This definition appears to be transplanted from the ECOWAS Protocol on Democracy and Good Governance (2001), art 2(1).

81 Vienna Convention on the Law of Treaties (Vienna Convention), art 2(1)(b).

82 KW Abbott and D Snidal “Hard and soft law in international governance” (2000) 54/3 *International Organization* 421 at 426.

83 On the understanding of “coercive enforcement” as an imposition of costs on violators of international law to foster compliance, see A Thompson “Coercive enforcement of international law” in JL Dunoff and MA Pollack (eds) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2012, Cambridge University Press) 502.

84 T Maluwa “Ratification of African Union treaties by member states: Law, policy and practice” (2012) 13/2 *Melbourne Journal of International Law* 1 at 40. In 2012 the Executive Council also established a Ministerial Committee and a Standing Committee of Experts to address the “challenges of ratification / accession and implementation of OAU / AU treaties”, EX.CL/Dec. 705 (XXI). The Department of Legal Affairs of the AU Commission (Office of the Legal Counsel) has also organized various training sessions to build the capacity of national legislative drafters and to promote the domestic implementation of AU treaties.

85 See, for example, A Mangu “African civil society and the promotion of the African Charter on Democracy, Elections and Governance” (2012) 12 *African Human Rights Law*

However, treaties also pose a number of challenges. First, they may take a longer time to draft and to attract a sufficiently broad substantive consensus. For instance, the ACDEG was developed over a series of 16 different meetings convened at various levels over a period of almost four years. Secondly, reaching the sufficient number of ratifications for treaties to enter into force may also take considerable time, five years (2007–12) in the case of the ACDEG. This challenge was specifically acknowledged in 2009 in relation to the AU's limited effectiveness in responding to unconstitutional changes of government. Recognizing a "resurgence of the scourge of coups d'état in Africa"⁸⁶ in 2009 and the slow ratification rate of the ACDEG,⁸⁷ the Assembly reiterated the provisions set out in chapter 8 of the ACDEG (sanctions against unconstitutional changes of government) in a binding Assembly decision to supplement and strengthen the existing sanctions regime in the Lomé Declaration.⁸⁸

Technocratization

The challenge of ensuring a treaty's adequate implementation has been a key component of the AU's recent agenda to transition from "norm-setting to norm-implementation".⁸⁹ To ensure adequate implementation of the ACDEG, the AU developed a comprehensive compliance system. Besides establishing different procedures to enforce and protect certain democratic standards under its "unconstitutional changes of government" agenda,⁹⁰ the ACDEG also has a crucial role in monitoring and promoting a number of democratic norms. Essentially, the charter serves as a benchmark to survey the state of democratic governance in different AU member states. If necessary, the AU can then develop assistance programmes to help member states bring their governance arrangements in line with agreed continental

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Journal 348; S Gilbert "The campaign to promote the African Union Charter on Democracy, Elections and Governance: Insights into advocacy on the African continent" (2013) *U4 Practice Insight* 3.

86 Decision on the Resurgence of the Scourge of Coups d'Etat in Africa, Assembly/AU/Dec.220(XII) (2009).

87 *Interim Report of the Chairperson of the Commission on the Prevention of Unconstitutional Changes of Government Through Appropriate Measures and Strengthening the Capacity of the African Union to Manage Such Situations*, Assembly/AU/7(XIII) (2009) at 15 (copy on file with the authors).

88 Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacity of the African Union to Manage Such Situations, Assembly/AU/Dec.269(XIV) Rev.1 (2010).

89 See, for example, statement by HE Dr Nkosazana Dlamini Zuma, chairperson of the AU Commission, on the occasion of the commemoration of Africa Human Rights Day under the theme, "Women's rights: Our collective responsibility" (21 October 2016), available at: <<https://au.int/en/newsevents/31522/commemoration-africa-human-rights-day>> (last accessed 10 January 2019).

90 See above at note 8.

standards.⁹¹ The types of AU mechanisms through which the quality of governance is assessed are increasing in both number and scale. This increase can be explained by a combination of factors, including institutional emulation, a certain level of path dependency and a growing turn to conflict prevention. Underlying this expanding compliance system is a trend to rely more and more on AU bureaucrats and experts to monitor and provide technical assistance to ensure the implementation of AU instruments. One of the key consequences of this trend is the gradual expansion of the AU's authority. This is not to say that the AU has necessarily gained much in decision-making powers, which generally remain in the purview of diplomats and politicians. However, the increased reliance by member states on AU bureaucrats and experts does lead to important gains in AU influence by allowing these technocrats to have a key role in setting the agenda for decision-making⁹² and framing the context in which decisions are made.⁹³

One of the most innovative outcomes of the ACDEG has been the development of an African Governance Architecture (AGA) since July 2010.⁹⁴ The AGA is conceptualized as “a platform for dialogue between the various stakeholders with the mandate to promote good governance and strengthen democracy in Africa”⁹⁵ and is operationalized through the African Governance Platform.⁹⁶ The platform has as its primary objective the implementation of the ACDEG.⁹⁷ Its Secretariat is hosted by the Department of Political Affairs of the AU Commission, which is responsible for coordinating the implementation of the ACDEG as mandated by article 45(c) of the ACDEG.

The most direct mechanism to monitor and enhance compliance with the ACDEG is a state reporting mechanism. Every two years state parties are obliged to submit a report of the various measures they have taken to give effect to the principles and commitments in the ACDEG.⁹⁸ The reports are

91 See ACDEG, arts 18, 44(2)(A)(c) and 45(b).

92 A Chayes, A Handler Chayes and RB Mitchell “Managing compliance: A comparative perspective” in B Weiss and H Jacobson (eds) *Engaging Countries: Strengthening Compliance with International Environmental Accords* (1998, MIT Press) 39 at 60.

93 Kennedy *A World of Struggle*, above at note 74 at 7.

94 Decision on the Theme, Date and Venue of the 16th Ordinary Session of the Assembly of the African Union, Assembly/AU/Dec.304(XV) (2010).

95 Rules of Procedure of the African Governance Platform (2016), rule 1.

96 *Id.*, rule 3. The platform is the AGA's institutional mechanism and comprises the APRM, ACHPR, ACtHPR, AU Commission, PSC, African Committee of Experts on the Rights and Welfare of the Child, AU Advisory Board on Corruption, AU Commission on International Law, the Economic, Social and Cultural Council, NEPAD Planning and Coordinating Agency, Pan-African Parliament, regional economic communities and any other existing AU organ or institution that may be given the mandate or established by the Assembly to promote governance, democracy and human rights (*id.*, rule 2).

97 *Id.*, rule 3. See also ACDEG, arts 44, 45 and 49.

98 ACDEG, art 49(1).

expected to be developed based on a set of guidelines adopted in 2016.⁹⁹ This mechanism builds on the institutional experience within the AU in respect of other treaties, including the African Charter (see section on “The past” above). It differs, though, in its central coordinating role, which is accorded to the AU Commission instead of the ACHPR. So far only one state (Togo) has submitted a report,¹⁰⁰ although 29 reports were due as of January 2019.¹⁰¹ As of January 2019, more than 20 months after the submission of the Togo report, the concluding observations and recommendations based on the state report have still not been communicated. However, the state reporting guidelines provide that the “entire review process of each State Party report shall take no more than nine (9) months”.¹⁰² These developments raise serious questions concerning the effectiveness of this monitoring mechanism.

The ACDEG also mandates the AU Commission to prepare a synthesized report on the implementation of the charter.¹⁰³ This report shall contain “specific and concise recommendations to the Assembly and State Parties on measures necessary to effectively implement the Democracy Charter”.¹⁰⁴ The preparation of such a report and the selection of information made by the AU Commission, grant it an influential role in framing the issues and debates on which the Assembly and Executive Council are then to decide. To date, the AU Commission has not yet fully seized the potential offered by this tool, as only two reports have been prepared to address this treaty obligation.¹⁰⁵

These treaty reporting mechanisms show the emphasis placed on transparency and information sharing as key conditions to ensure compliance.¹⁰⁶ Eventually, the self-reporting by state parties and independent reporting by the AU Commission may also lead to a level of harmonization of governance arrangements through the adoption of concluding observations and recommendations from which fellow member states can emulate best practices

99 “Guidelines for state parties’ reports under the ACDEG” (2016) in Rules of Procedure of the African Governance Platform, annex 1, available at: <<http://aga-platform.org/sites/default/files/2018-10/Rules%20of%20Procedure%20FINAL.pdf>> (last accessed 21 February 2019).

100 “Togo, first AU member state to submit state report on African Charter on Democracy, Elections and Governance” (AU press statement 044/2017, 27 March 2017), available at: <<https://au.int/en/pressreleases/20170327/togo-first-au-member-state-submit-state-report-african-charter-democracy>> (last accessed 10 January 2019).

101 Theoretically, several states should already have reported twice (for example, Côte d’Ivoire, Mali and Sudan) or three times (for example, Benin, Malawi and Nigeria), as they ratified the ACDEG more than four and six years ago, respectively.

102 “Guidelines for state parties’ reports”, above at note 99, para 32.

103 ACDEG, art 49(3).

104 “Guidelines for state parties’ reports”, above at note 99, para 36.

105 See Decision on Report of the Commission on Governance in Africa (with Focus on the African Governance Architecture and Elections), Assembly/AU/Dec.585(XXV) (2015) and Decision on Governance, Constitutionalism and Elections in Africa, Assembly/AU/Dec.592(XXVI) (2016).

106 Chayes, Handler Chayes and Mitchell “Managing compliance”, above at note 92.

and take steps to avoid receiving similar critique on their governance systems.¹⁰⁷

This rationale of “managing” compliance through “cooperative processes of consultation, analysis, and persuasion, rather than coercive punishment”¹⁰⁸ is similarly embedded in the APRM, which uses the ACDEG as one of its main benchmarks to assess the quality of the political governance of APRM member states.¹⁰⁹ Through an external review and a country self-assessment, complemented by a peer review process at the level of heads of state and government, best practices and challenges are identified to improve the continental governance landscape. The ACDEG even establishes a direct and indirect link with the APRM.¹¹⁰ Article 36 of the ACDEG obliges states to “promote and deepen democratic governance by implementing the principles and core values of ... the African Peer Review Mechanism”. Article 16 exhorts states to “cooperate at regional and continental levels in building and consolidating democracy through exchange of experiences”. This provision clearly intersects with the philosophical foundation of the APRM. Examples of best practices highlighted in APRM country review reports that overlap with ACDEG norms include “compliance with the electoral timetable for presidential and legislative elections”,¹¹¹ “democratic changeover at the helm of state affairs: expressing a shared culture of democracy, tolerance and fair play”¹¹² and the “declaration and publication of assets as a signal of commitment to good governance” by the president.¹¹³

The idea of sharing experiences is not unique to the APRM. It also figures prominently in the AU’s electoral support agenda. This agenda consists of two core mandates: election observation and electoral assistance. The ACDEG has become the principal instrument for AU electoral assistance and observation efforts. Over the past decade the AU has greatly professionalized its operations in evaluating domestic electoral processes against international and continental standards. Before, AUEOMs were largely diplomatic missions with small observer teams comprising career diplomats and a limited number of AU staff. Gradually these missions have become more technical, composed primarily of election experts from the AU Commission, election management

107 See also ACDEG, art 44(2)(A)(b), concerning the objective of harmonizing the policies and laws of state parties to promote favourable conditions for democratic governance.

108 Chayes, Handler Chayes and Mitchell “Managing compliance”, above at note 92 at 41.

109 Although the APRM assesses four domains of governance, ACDEG provisions are most closely associated with the APRM’s democracy and political governance mandate, rather than the three other thematic areas it assesses (economic governance and management, corporate governance and socio-economic development). Although the ACDEG touches upon these areas, they are generally not considered to be its main focus, especially since these areas are regulated in more detail in other AU instruments.

110 The APRM is also a member of the African Governance Platform. See above at note 96.

111 *APRM Country Review Report of Benin* (2008) at 77. See for example ACDEG, arts 3(4) and 17.

112 *APRM Country Review Report of Benin*, id at 79. See for example ACDEG, arts 2(3) and 23(5).

113 *APRM Country Review Report of Nigeria* (2009) at 18. See for example ACDEG, art 12(1).

bodies and civil society.¹¹⁴ Some of the most notable developments have included: transition of AUEOMs from short term observation to long term observation missions; institutionalized training sessions for AU election observers (short and long term observation missions, election, media and legal experts); consolidation of the practice of sending AUEOMs to all parliamentary and presidential elections; and improvement and standardization of the observation methodology and reporting. The ACDEG also led to a more meticulous approach to the assessment of elections through the deployment of pre-election assessment missions.¹¹⁵ In a form of path dependency, the increased level of detail in the assessments also contributes to a finer level of recommendations to specific target groups. These recommendations then form the basis of technical assistance programmes, as seen, for example, in Malawi (2015), Côte d'Ivoire (2015), Madagascar (2016), Cameroon (2016), Somalia (2017) and Zimbabwe (2018). The AU through its Democracy and Electoral Assistance Unit (DEAU)¹¹⁶ has gradually developed its capacity to organize follow-up missions to strengthen electoral institutions and improve electoral processes through the deployment of experts to support election management bodies and by facilitating peer-to-peer learning among election authorities.¹¹⁷

Generally, the AU's involvement has, unsurprisingly, been greatest in country contexts associated with electoral violence, which is still a recurrent practice on the African continent. These conflict dynamics have also led to a greater role and involvement for the PSC in the implementation of the ACDEG by it holding regular sessions on elections in Africa and addressing election-related political tensions.¹¹⁸ This more pro-active approach reflects the underlying logic to invest more time and effort into conflict prevention.¹¹⁹

114 Id, art 21(2). See CC Aniekwe and SM Atuobi "Two decades of election observation by the African Union: A review" (2016) 15/1 *Journal of African Elections* 25 at 32–33.

115 ACDEG, art 20.

116 Decision on the Establishment and Organization of a Democracy and Electoral Assistance Unit and Fund, EX.CL/Dec.300 (IX) (2006). The DEAU was established in 2006 and became fully operationalized in 2008.

117 See, for example, "African Union BRIDGE training for the Independent National Electoral Commission opens today in Antananarivo, Republic of Madagascar" (6 October 2018), available at: <<https://au.int/en/pressreleases/20161006-0>> (last accessed 10 January 2019); "African Union Commission convenes 4th annual continental forum of election management bodies" (8 November 2017), available at: <<https://au.int/en/pressreleases/20171108/african-union-commission-convenes-4th-annual-continental-forum-election>> (last accessed 10 January 2019).

118 See, for example, PSC Communiqué of the 747th Meeting (18 January 2018), AU doc PSC/PR/COMM (DCCXLVII).

119 See, for example, PSC Communiqué of the 589th Meeting (12 April 2016), AU doc PSC/PR/COMM (DLXXXIX) and PSC Press Statement of the 791st Meeting (22 August 2018), AU doc PSC/PR/BR (DCCXCI).

Judicialization

One of the most notable developments concerning the ACDEG is the determination by the ACtHPR, in its judgment in *APDH v Côte d'Ivoire*, that the charter constitutes a human rights instrument.¹²⁰ This finding established the justiciability of the ACDEG, which means that litigants can now claim rights enshrined in the charter before the ACtHPR.¹²¹ The judgment gives an indication of the ACDEG's potential as an instrument through which to challenge questionable governance practices and rights violations by means of litigation. This development is remarkable for two reasons. First, this enforcement mechanism was not explicitly foreseen in the ACDEG. Secondly, the ACtHPR's growing role in reinforcing democratic regimes by developing case law and normative guidance on some essential aspects of democratic governance reflects a global trend of judicializing politics, where courts are increasingly relied upon to "address core moral predicaments, public policy questions, and political controversies".¹²²

The unanticipated role of the ACtHPR in enforcing the ACDEG can be deduced from the debates that informed the court's decision. The court has jurisdiction over all human rights instruments ratified by the states involved in proceedings before it.¹²³ To establish whether the ACDEG is a human rights instrument, the court requested an opinion from the AU Commission and the African Institute for International Law. In line with their submissions the court followed a purposive interpretation and concluded that the ACDEG is a human rights instrument, since it expressly enunciates subjective rights and prescribes obligations for states for the enjoyment of those rights.¹²⁴ In its reasoning, the ACtHPR did not refer to preparatory work for the ACDEG, probably as there is no mention of the idea that the ACDEG would be considered a justiciable instrument. The ACDEG does refer to a "competent court of the Union" potentially to try perpetrators of unconstitutional changes of government.¹²⁵ In earlier drafts, the "African Court of Justice and Human Rights" was envisaged to exercise this role.¹²⁶ With the adoption of the Malabo

120 *Actions pour la Protection des Droits de l'Homme (APDH) v Republic of Côte d'Ivoire*, (APDH v Côte d'Ivoire) appln no 001/2014, paras 47–65. See G Niyungeko "The African Charter on Democracy, Elections and Governance as a human rights instrument" in this issue.

121 See B Kioko "The African Charter on Democracy, Elections and Governance as a justiciable instrument" in this issue.

122 R Hirschl "The judicialization of politics" in GA Caldeira, RD Kelemen and KE Whittington (eds) *The Oxford Handbook of Law and Politics* (2008, Oxford University Press) 119 at 119.

123 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court (1998) (Court Protocol), art 3(1).

124 *APDH v Côte d'Ivoire*, above at note 120, paras 57–65.

125 ACDEG, art 25(5).

126 *Report of the Ministerial Meeting on the Draft African Charter on Democracy, Elections and Governance and on the Revision of the Lomé Declaration on Unconstitutional Changes of Government in Africa*, EX.CL/258(IX) (2006) (copy on file with the authors).

Protocol, the jurisdiction to try individuals for the “crime of unconstitutional change of government” was specifically delegated to the International Criminal Law section of the merged court.¹²⁷ However, establishing criminal responsibility constitutes a completely different judicial process. Among other things, it is targeted at individuals, while ACtHPR adjudication of possible infringements of rights protected in the ACDEG has states as defendants and results in different types of remedies.

The judicialization of politics on the African continent is most apparent in the role played by continental and regional courts in establishing judicial oversight of electoral processes.¹²⁸ For example, in the case of *APDH v Côte d’Ivoire*, the ACtHPR had to evaluate the legitimacy of the Côte d’Ivoire’s election management body. It resulted in the court setting standards for the “independence” of election management bodies, as prescribed by article 17 of the ACDEG, and ordering the state to make its electoral law compliant with relevant international instruments, including the ACDEG.¹²⁹ However, this is not the only time the ACtHPR has adjudicated on electoral matters. For example, in *Mtikila v Tanzania* it established that a ban on independent electoral candidates violated the right to political participation (article 13 of the African Charter) and directed the state to amend its constitution.¹³⁰ Regional courts in Africa, such as the Economic Community of West African States Court of Justice (ECOWAS Court), developed similar jurisprudence on electoral processes. For example, in a case against Burkina Faso, the ECOWAS Court decided in 2015 that an electoral law excluding candidates associated with the previously ousted regime violated the right to participate freely in elections and ordered the state to remove relevant obstacles to electoral participation.¹³¹ These instances show the broader tendency of continental and regional courts in Africa to adjudicate on violations that require change in national legislative frameworks. In those instances the remedies go beyond reparations for individual victims and take the form of constitutional review. As a result, these courts adjudicate, and thereby become involved in, salient political and constitutional disputes at the domestic level.

127 Malabo Protocol, art 17.

128 Hirschl “The judicialization of politics”, above at note 122 at 126.

129 The ACtHPR established that “an electoral body is independent where it has administrative and financial autonomy; and offers sufficient guarantees of its members’ independence and impartiality”: *APDH v Côte d’Ivoire*, above at note 120, para 118.

130 See *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R Mtikila v United Republic of Tanzania (Mtikila v Tanzania)* appln nos 009 and 011/2011.

131 *Congrès pour la Démocratie et le Progrès (CDP) et Autres v l’Etat du Burkina* ECOWAS Court of Justice judgment no ECW/CCJ/JUG/16/15. Remarkably, the applicants in this case also invoked a violation of the ACDEG. However, the court did not explicitly base its ruling on the ACDEG.

The ACtHPR's advisory procedure is another likely avenue for judicial policy-making. Besides contentious proceedings, the ACtHPR has a mandate to issue advisory opinions "on any legal matter relating to the Charter or any other relevant human rights instruments".¹³² It is imaginable that "member states, the AU, any of its organs, or any African organization recognised by the AU"¹³³ may request the court to give an interpretation of certain rules and principles enshrined in the ACDEG. Although these opinions would not be binding per se, they would be authoritative. The procedure would provide the ACtHPR with an opportunity to elaborate on the meaning of principles, standards and obligations enshrined in the ACDEG that fall within the scope of the request made. The ACtHPR had already been requested to provide a clarification of the ACDEG, specifically in connection to article 23 concerning the possibility of bringing a case against a state before the ACHPR or the ACtHPR following an unconstitutional change of government.¹³⁴ However, the ACtHPR decided that it could not give an opinion on the request because the applicant did not meet the conditions of an "African organization recognised by the AU" and therefore the court lacked personal jurisdiction.¹³⁵ Although, this mechanism has been under-utilized to date, partly due to restrictive access rules,¹³⁶ it is likely that more requests for advisory opinions will be submitted in the future.

THE FUTURE: CONTEXTUAL FACTORS SHAPING IMPLEMENTATION

The ACDEG's track record in its first decade offers cause for both optimism and concern about its future implementation. Successes to date include the development of new and improved governance accountability mechanisms, which have contributed to an overall higher quality of elections¹³⁷ and more dynamic human rights enforcement.¹³⁸ At the same time, as highlighted above, various contextual factors still impede the realization of the objectives set out in the ACDEG. These factors can be grouped into three broad categories: legal context; actor dynamics; and socio-political context. Due to spatial constraints, this section does not consider in great detail the whole range of factors that may impair or propel the ACDEG's future operationalization. Instead, it focuses on the most salient issues related to the trends outlined above.

132 Court Protocol, art 4(1).

133 Ibid.

134 Rencontre Africain pour la Défense des Droits de l'Homme, request no 002/2014.

135 Id, paras 38–39.

136 A Jones "Form over substance: The African Court's restrictive approach to NGO standing in the SERAP advisory opinion" (2017) 17 *African Human Rights Law Journal* 321.

137 "Better elections, but not a better participatory environment": 2018 *Ibrahim Index of African Governance Report* (2018, Mo Ibrahim Foundation) at 40.

138 See Kioko "The African Charter", above at note 121.

Legal context

A number of legal factors, including normative, institutional and procedural factors, will continue to influence heavily the extent of the ACDEG's implementation. Normative factors include both the binding quality of the set of rules as well as the subject matter on which behaviour is prescribed or prohibited. First, in terms of the issue of membership already highlighted in the section on "The present" above, treaties are generally only binding on those states that have ratified the instruments or, in other words, become members of the particular treaty regime.¹³⁹ Therefore, full continental implementation of the ACDEG can only be achieved through full continental ratification of the ACDEG.¹⁴⁰ To achieve this, ratification is needed from an additional 23 AU member states. Encouragingly, 17 out of those 23 states have already signed the treaty, which is often an important stepping stone towards ratification.¹⁴¹ At the same time, several states have been a signatory for more than ten years (for example, Burundi, Mauritius, Eswatini (Swaziland), The Gambia, Kenya and Senegal). Secondly, the authors anticipate strong variation in the implementation of the ACDEG across different policy issues. The ACDEG provides minimum standards across a wide range of governance areas. Compliance with some rules and principles will be less problematic to ensure than others. For example, in many countries, accomplishing the goal of organizing regular free and fair elections¹⁴² will likely precede the achievement of gender balance and equality in decision-making processes.¹⁴³ Systematic monitoring of the ACDEG will allow the detection of disproportionate divergences in implementation, which may result in more targeted interventions, including through advocacy and assistance programmes, as well as through complementary coercive enforcement, to bring *all* national policies gradually into conformity with agreed continental standards.

Several institutional factors will impact implementation. The most important factor here is, arguably, capacity. The challenge of capacity (financial, technical and human) is well-known both within member states as well as within different AU institutions. A lack of capacity within national law and policy making organs can impede various crucial aspects of the ACDEG's implementation, ranging from organizing the ratification processes and developing

139 For current purposes, included in this understanding is the act of "accession", as it has the same legal effects as ratification. See Vienna Convention, art 2(1)(b).

140 CC Aniekwe, L Oette, S Vandeginste and M Wiebusch "Policy brief on the 10th anniversary of the African Charter on Democracy, Elections and Governance" (2017) at 8, available at: <<https://www.uantwerpen.be/images/uantwerpen/container2673/files/PolicyBrief-AfricanCharter.pdf>> (last accessed 10 January 2019).

141 Vienna Convention, arts 12 and 18.

142 ACDEG, arts 2, 3, 17 and 32(7).

143 Id, arts 2, 3 and 29. For an analysis of the implementation of the ACDEG specifically in relation to gender dimensions, see N Abdulmelik and T Belay "Advancing women's political rights in Africa: The promise and potential of the African Charter on Democracy, Elections and Governance" (2019) *Africa Spectrum* (forthcoming).

implementation legislation and policies, to carrying out procedural treaty obligations such as state reporting. It is likely that ACDEG state reporting will face challenges similar to those other AU state reporting mechanisms have encountered. Comparative experience with the African Charter and the commitment shown so far by state parties suggest that, at least in the short-term, ACDEG state reporting will be characterized by late, ad-hoc, vague and limited reporting.¹⁴⁴ These factors, combined with an increasing onus on states to report on a multitude of instruments, especially since all new AU governance instruments also create state reporting duties, risk undermining the impact of treaty reporting mechanisms.¹⁴⁵ However, the ACDEG does establish a mandate for the AU Commission to “provide technical support for effective implementation of the Charter”.¹⁴⁶ This mandate, which implies further continental technocratization, may form a solution to overcome national capacity problems, provided that the AU itself is endowed with sufficient capacity. It is worth noting here that article 7 of the ACDEG even imposes an obligation on state parties to “strengthen [AU organs] and endow them with necessary resources”.

One of the most significant procedural factors to influence the implementation of the ACDEG is access rules. The section on “The past” above showed that AUEOMs developed in such a way that formal invitations are no longer required. This practice helps circumvent attempts by governments to renegotiate the terms under which observation missions are organized, particularly when their objective is submitting the mission to unfavourable restrictions, including vetting election observers or unduly narrowing the scope of the observation mandate.¹⁴⁷ Upholding this approach will greatly contribute to the credibility of AUEOMs. Furthermore, access rules are also crucial in enforcement processes. As demonstrated above, the ACtHPR may have a crucial role in enforcing the rights and principles enshrined in the ACDEG. However, as of January 2019, only 30 states have accepted the court’s jurisdiction and just nine states have granted individuals and qualified NGOs (the main protagonists of international human rights litigation) direct access to the court.¹⁴⁸ This limited access undermines the development of a comprehensive continental accountability regime. Access rules may also refer to entry points for civil society organizations to call directly for political support

144 M Evans and R Murray “The state reporting mechanism of the African Charter” in M Evans and R Murray (eds) *The African Charter on Human and Peoples’ Rights: The System in Practice 1986–2006* (2008, Cambridge University Press) 49.

145 See in respect of developments on UN treaty reporting mechanisms in this regard, I Bantekas and L Oette *International Human Rights Law and Practice* (2018, Cambridge University Press) at 205–08.

146 “Guidelines for state parties’ reports”, above at note 99, para 34.

147 T Legler and TK Tieku “What difference can a path make? Regional democracy promotion regimes in the Americas and Africa” (2010) 17/3 *Democratization* 465 at 481.

148 Court Protocol, arts 5(3) and 34(6).

from the AU (ie the AU Commission chairperson or the PSC) in enforcing ACDEG provisions, particularly in the case of an imminent political crisis.¹⁴⁹ A failure to grant them adequate access would not only undermine the AU's credibility and legitimacy, but also risks losing important allies in the promotion of better governance on the African continent.¹⁵⁰

Actor dynamics

The ACDEG's broad thematic focus leads to the involvement of a wide range of actors both at state as well as AU level. First, following the liberal tradition, the state can be disaggregated into various sub-state components, including government, courts, Parliament, public administration, electoral bodies, media and civil society. The ACDEG itself already expressly implicates a diverse set of sub-state actors that are part of its implementation constituency (see Table 1). Secondly, the AGA Platform also consolidates an extensive number of AU bodies with a mandate to implement the ACDEG (see Table 1). Implementation of the ACDEG will be dependent on the level of synergy among and between these implementation partners, including, for example, between: the Pan-African Parliament and national Parliaments; the AU's Economic Social and Cultural Council (ECOSOCC) and civil society organizations; the ACtHPR and constitutional and supreme courts, as well as the broader legal community comprising judges, lawyers, legal academics, bar associations and (transnational) NGOs; and the DEAU and electoral bodies, as well as other key electoral stakeholders such as political parties. The AU's strategy of increasing its engagement with its implementation partners in a holistic manner will facilitate its efforts in holding states to account and collectively build momentum to improve levels of democratic governance. This cooperative engagement might then also encourage more robust enforcement of the ACDEG through political pressure in the AU policy organs (the Assembly and Executive Council). For example, article 46 of the ACDEG establishes an, as yet unused, sanctioning mechanism for violations of the ACDEG through the Assembly and PSC. Without sufficient domestic and transnational political support it is unlikely that a wide enough consensus will materialize in such political fora to sanction other governments for the violation of legal commitments.

149 See A Witt "Where regional norms matter: Contestation and the domestic impact of the African Charter on Democracy, Elections and Governance" (2019) *Africa Spectrum* (forthcoming).

150 See A Witt "Whose charter? How civil society makes (not) use of the African Democracy Charter" (2019) *PRIF Spotlight* (forthcoming).

Table 1. Implementation of ACDEG: Contextual factors

LEGAL CONTEXT		ACTOR DYNAMICS		SOCIO-POLITICAL CONTEXT
STATE LEVEL		AU LEVEL		
NORMATIVE				
Membership	• Government	• Assembly		Powerful vs weak states
Subject variation	• Judiciary	• Executive Council		
INSTITUTIONAL	• Parliament	• PSC		Authoritarian vs rule of law regimes
Capacity	• Public administration	• AU Commission		
	• Armed and security forces	• ACTHPR		(Post)conflict vs stable states
PROCEDURAL	• Electoral body	• APRM		
Access	• Public institutions that promote and support democracy and constitutional order	• ACHPR		
	• Political parties	• Pan-African Parliament		
	• Media	• African Committee of Experts on the Rights and Welfare of the Child		
	• Civil society organizations	• AU Advisory Board on Corruption		
	• Private sector	• ECOSOC		
	• Citizens	• New Partnership for Africa's Development		
		• Regional economic communities		

Source: Authors' own compilation.

Socio-political context

The implementation of the ACDEG is also dependent on particular socio-political contexts. First, realist accounts would expect implementation of the ACDEG to be contingent on the interests of powerful states. The “big five” member states that contribute the vast majority of the AU budget are South Africa, Nigeria, Algeria, Egypt and Libya. Of these five, only three (South Africa, Nigeria and Algeria) have ratified the ACDEG and none has accepted direct access by individuals and NGOs to the ACtHPR. Support by these states for implementation of the ACDEG would increase the likelihood of “binding weaker states to the system” as well as allowing the “stronger powers to bear the costs of enforcement”.¹⁵¹

Secondly, the level of implementation will also vary according to the quality of the governmental regime. Implementation of international agreements is more probable in rule of law regimes¹⁵² than in authoritarian states.¹⁵³ Of course, this observation is almost tautological considering that the ACDEG’s subject matter is precisely the promotion of democracy, human rights and the rule of law. Nevertheless, if, for example, the ACtHPR’s energetic seizure of its mandate (including enforcing the ACDEG) is not matched with a commensurate commitment by states to the idea of human rights and democracy protection, then political backlash against the ACtHPR may follow.¹⁵⁴ This backlash could range from (systematic) non-compliance with decisions, to a broad transnational coalition to dismantle the court.¹⁵⁵

Thirdly, conflict dynamics will influence the ability of states to implement the ACDEG. Higher levels of implementation are expected in stable countries and post-conflict states. However, the latter group may struggle with more capacity challenges as conflicts tend to drain and destroy state resources. At the same time, post-conflict processes, including transitional governance arrangements, are increasingly fused with international law and politics matched with assistance programmes with a bias towards democratic state reconstruction.¹⁵⁶ These dynamics could also propel implementation of the ACDEG.

151 Goldstein et al “Introduction”, above at note 74 at 391.

152 M Kahler “Conclusion: The causes of and consequences of legalization” (2000) 54/3 *International Organization* 661 at 675.

153 For an analysis of the influence of regime types (liberal vs illiberal democracies) on the implementation of ACDEG, see U Engel “The 2007 African Charter on Democracy, Elections and Governance: Trying to make sense of late ratification and non-implementation of compliance mechanisms” (2019) *Africa Spectrum* (forthcoming).

154 TG Daly and M Wiebusch “The African Court on Human and Peoples’ Rights: Mapping resistance against a young court” (2018) 14/2 *International Journal of Law in Context* 294.

155 M Madsen, P Cebulak and M Wiebusch “Backlash against international courts: Explaining the forms and patterns of resistance to international courts” (2018) 14/2 *International Journal of Law in Context* 197.

156 See E De Groof and M Wiebusch (eds) *International Law and Transitional Governance* (forthcoming, Routledge); R Paris “International peacebuilding and the ‘mission civilisatrice’” (2002) 28/4 *Review of International Studies* 637.

In sum, the authors anticipate a great level of variation in the implementation of the ACDEG across countries, subject areas and actors. No single cause can ensure its full operationalization. A convergence of several contextual factors favourable to the implementation of the ACDEG is required to trigger and maintain it. Charting the contextual factors that shape the ACDEG's actual implementation and expanding the framework in this article with, for example, economic and cultural factors, suggest a fruitful area for further empirical study.

CONCLUSION

The main aim of this article was to analyse the record of the implementation of the ACDEG in promoting and protecting democratic governance. In doing so, it has considered the various (O)AU policy agendas that were consolidated in the instrument, the various innovations propelled by the ACDEG, as well as the different challenges encountered in its implementation. The examination of the charter's legislative genealogy made clear that it is only one of many sites featuring the struggle regarding the "Africanization" of domestic governance arrangements. The historical analysis revealed that many progressive ideas about how the AU can contribute to strengthening the democratic landscape had already been circulating on the continental plane but were, due to insufficient political support, rejected in favour of more restrained attitudes towards continental governance. Yet, the article also noted that several ideas on more robust continental engagement eventually did develop the necessary momentum. These include coercive human rights enforcement, direct access to monitor compliance with democratic election standards and a stricter ban on undemocratic practices.

Overall, the article noted that the African continent is increasingly moving towards more cooperation in the domain of democracy, elections and human rights, through legalization, technocratization and judicialization. This is evident in the growth of AU legal instruments in the domain of democratic governance, increased reliance on technical experts instead of political or diplomatic actors in interpreting and implementing these instruments, as well as the expanding role of continental and regional judicial bodies in adjudicating on these instruments. These processes signal a greater collective commitment to effective democratic governance, rather than the inverse, notwithstanding the various remaining democratic challenges throughout the continent and the challenge of ensuring adequate compliance and enforcement of states' commitments. These challenges include but are not limited to: generating sufficient buy-in from member states to ratify the ACDEG; capacity levels to ensure and monitor democratic governance; and the limited acceptance of continental human rights enforcement. The AU is undeniably ambitious in its intention to contribute to the agenda of democratization in Africa. However, its success will depend on the interplay of a set of contextual factors, including legal factors, the dynamics between actors

involved in the implementation of ACDEG, and broader social and political contexts.

The ACDEG's past has converged with an emerging global consensus on liberal democracy. It is reasonable to assume that its future will also be contingent on a number of global social, political and economic factors. This raises the question of whether the African consensus on liberal democracy will maintain momentum if a global trend continues towards a post-liberal world order. The rise of China, the inward turn of the United States concurrent with its withdrawal as the principal promoter of liberal values, and a further ascent of illiberal governments and nationalist movements in Europe suggest a possible transformation of the international liberal order. Exploring the degree of convergence with this global trend, or alternatively divergence through a potential African counter-trend, promises to be a fertile area for future research.